United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

76-7314

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/s

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

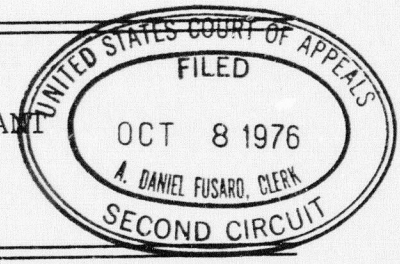
Plaintiff-Appellant-Appellee,

-against-

AMTRACO CORPORATION,

Defendant-Appellee-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AFTER TRIAL



REPLY BRIEF OF PLAINTIFF-APPELLANT AND CROSS-APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

-against-

AMTRACO CORPORATION,

Defendant.

Docket No. 76-7314

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REPLY BRIEF OF PLAINTIFF APPELLANT AND CROSS-APPELLEE

Preliminary Statement

BFG submits this brief in reply to the arguments of Amtraco contained in its brief. For the purposes of BFG's reply, two points must be made: the first concerns defendant's liability under the contract; the second concerns the measure of damages.

As will be argued below, the trial court correctly found the defendant liable under a contract, and then incorrectly applied the law as to burden of proof and the measure of damages. To affirm the district court's holding as to damages would be to negate the contract itself and permit Amtraco to escape responsibility for its breach.

ARGUMENT

POINT I.

THE LIABILITY OF AMTRACO IS UNAFFECTED BY ITS INTENTION TO RESELL THE GOODS.

The short answer to Amtraco's mistaken argument that, as a buyer for resale, it was discharged from liability to BFG when its customer defaulted, was given by Judge Knapp from the bench at the close of the trial:

> "It seems to me as though the plaintiff has established its case on liability. The two contracts on their face, talking of [Exhibits] 1 and 13, seem to me to be absolute sales.
>
> "There is ambiguity in the last -- I will call it a paragraph, although it is not really a paragraph -- the last three lines of the terms, but the document appears on its face to have been drawn by the defendant and therefore the ambiguity, if any, should be resolved against it.
>
> "I think it was the next-to-the-last witness, who was called by defendant, who referred to defendant's business as the buying and selling of commodities, specifically, lactose, and that is what these documents seem to me to purport to do.
>
> "In other words, if I sell stock to a broker and get a confirmation indicating that he, the broker, has bought my stock, the mere fact that he simultaneously sold it to someone else would seem to me to be no concern of mine.

"If someone else welshed on the deal that would seem to me to be the broker's headache.

"The more you look at these last three lines, they seem to specify the time of payment, the only condition being that they pass the Canadian Government authorities, and that condition was waived when it wasn't presented to the Canadian Government authorities for approval, it seems to me." (A 135-136)

In his first opinion Judge Knapp stated:

"On the basis of the foregoing [facts found as to the contract, see A 149-141] it is the conclusion of this court that the ability of the goods to pass customs inspection was the only condition precedent to defendant's obligation to pay; and that by its failure to ask that the goods be presented for inspection, the defendant waived that condition, and cannot now assert to non-performance as a defense. Amies v. Wesnofke (1931) 255 N.Y. 156, 162, Clark v. West (1908) 193 N.Y. 349; Young v. Hunter (1852) 6 N.Y. 203." (A 142)

The contrary contention of defendant (Amtraco brief, pp. 24-28) rests on the misconception that one who buys for resale is, by that fact alone, an agent of his customer, a proposition that would make all wholesalers agents of their retailer-customers. Nor does the knowledge of Mr. Baumann (BFG's negotiator) that Amtraco "was going to sell the lactose to a Canadian customer" affect the result. Baumann agreed that this fact was the equivalent of knowing that Amtraco was "not buying it for their own account" (A 45) because of the ambiguity of the phrase "for their own account", and only in the sense that he knew of its intended

resale. There is a vast difference between buying for resale and buying for a principal, yet both may be roughly subsumed under the phrase "not buying it for their own account". The clearly intended purport of Baumann's testimony is that he knew the defendant was trying to resell the goods, nothing more (A 46).

The purchase confirmation, as drafted by defendant, shows that defendant was the buyer, that defendant would pay the purchase price, that title to and risk of loss of the goods would pass to defendant, and that defendant's power to dispose of the goods was unlimited, whether exercised in Canada or elsewhere (Exhibits 1 and 13). Defendant signed the purchase order as principal, and it cannot purport to substitute its Canadian customer for itself as the obligated purchaser.

Defendant also suggests that it is excused by the "commercial impracticability" provision of the New York Uniform Commercial Code §2-615. (Amtraco Brief, Point II, pp. 29-33) That Section excuses sellers when contracts become "impracticable" by reason of a change in basic assumptions of the agreement. (To date, no seller has successfully invoked the Section in defense to an action.) The omission of "buyers" from the text of the Section is not without significance: the ordinary obligation of buyers is to pay the price, not to perform an act (deliver goods) of variable

difficulty. Amtraco has omitted essential parts of official comment 9 in quoting therefrom (Amtraco Brief, p. 30).*

There is nothing in the purchase order (or in the entire record) to show that the parties constructed their agreement on the foundation that a particular, identified Canadian

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* The Official Comment to the New York Uniform Commercial Code, §2-615, nevertheless extends the Section to buyers under the rarest of circumstances, by analogy to the case of a farmer who has contracted to sell crops to be grown on "Designated land", as follows: "9. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

"Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it is a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement sub-contract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present selection may well apply and entitle the buyer to the exemption." (Emphasis is supplied.)

customer must honor his contract with Amtraco as a condition of Amtraco's obligation to BFG.

In summary, the trial court's decision holding Amtraco liable under the purchase confirmation should be upheld; Amtraco's asserted agency is unsupported by the evidence and proceeds in any event from the wrong premise that a contemplated "instant resale" of goods made it seller's agent. The only condition of payment by defendant, passage of the goods through Canadian customs, was waived by defendant and is unavailable as a defense. Amies v. Wesnofky, 255 N.Y. 156 (1930); Clark v. West, 193 N.Y. 349 (1908); Amtraco took no steps to present the lactose to Canadian customs, and there was no proof that the goods would have failed to pass. The only plausible legal conclusion is that defendant by its inaction waived its right to insist on the condition of payment. Moreover, defendant's failure to move the goods it had purchased broke the contract between the parties, and it now should not escape liability. See also International Firearms Co. v. Kingston Trust Co., 6 N.Y. 2d 406 (1959).

POINT II.

THE TRIAL COURT MISALLOCATED THE BURDEN OF PROOF IN REQUIRING PLAINTIFF TO SHOW THAT IT RESOLD REASONABLY, AND MISAPPLIED THE BURDEN OF PROOF TO THE EVIDENCE.

The trial court has made no finding as to when the breach of contract occurred. Plaintiff has argued that until the final unconditional offer of defendant as documented in its telex of June 30 (Defendant's Exhibit BBB) defendant had not flatly rejected the goods but was engaged with plaintiff in negotiations seeking to adjust their differences. Defendant now concedes that, "after the Canadian customer refused to accept delivery of the lactose, Amtraco in good faith attempted to negotiate a new contract with BFG in substitution for the one that failed", and that these negotiations continued until June 30, 1972 (Appellee's Brief, pp. 32-33). The trial court failed to consider this period in its treatment of damages.

During this period of "negotiations" plaintiff did not resell the lactose to others, and incurred storage and other expense, as documented in evidence by Exhibits 4 - 12. The trial court in its amended opinion, failed to treat these expenses as incidental damage recoverable

under Section 2-706(1) and 2-710, and failed even to note that title to the goods along with liability for storage passed to defendant by the terms of the contract. The court erroneously, as a matter of law under Section 2-706, held that plaintiff had the burden of showing that it resold in good faith and in a commercially reasonable manner. This was error: there is a presumption that as seller plaintiff did resell properly. Wurlitzer Co. v. Oliver, 334 F. Supp. 1009 (W.D. Pa. 1971). The proper allocation of the burden of proof is an issue of law for the trial court to resolve; its misallocation is an error of law requiring reversal. Cities Service Oil Co. v. Dunlop, 308 U.S. 208 (1939). Moreover, Duesenberg & King put the burden on the buyer to show seller's unreasonableness. SALES & BULK SALES (1974) p. 13-67. See footnote 2 of the court's second opinion (A 166).

Even if the burden of proof was properly allocated by the trial court, it erred in determining a mixed question of law and fact, namely, that the burden had not been discharged by BFG. In addition to the presumption in its favor granted by Wurlitzer, supra, the testimony of Baumann showed that the method of resale followed by BFG was reasonable in all the circumstances. (A 31-34) The testimony of Najda, relied upon by Amtraco, speaks to the

issue whether lactose may generally be disposed of quickly in a ready market, and does not refute Baumann's testimony. (Amtraco Brief, pp. 12, 14, 39-41). Najda did not (and could not) testify that, given the circumstances that the parties were negotiating for eight months after the breach and that BFG was seeking the best possible price in the interest of both parties, BFG was proceeding unreasonably. Hence, the Wurlitzer presumption, combined with favorable testimony, were sufficient to discharge the plaintiff's burden.

Put another way, the principal error below is the trial court's failure to define precisely the time of defendant's breach; i.e., the time after title to the goods passed to defendant by the trust receipt (in effect the date of delivery) when defendant revoked its acceptance. Nowhere does the court address this crucial issue. The time of breach would determine the proper measure of contractual damages, that is, the difference, if any, between the contract price and market price at that time.

Furthermore, the time of breach would then fix the point at which seller's right to resell arises concomitant with its duty to mitigate incidental damages.

Until actually rejected, the contract between the parties should have prevailed to determine defendant's

obligation for storage charges which by its terms started on October 21, 1971. Defendant could not unilaterally rescind, and ignore the contract under which it took title and actually possessed the goods; and yet, in effect this is what the trial court's decision on damages has condoned. It has allowed a buyer to unilaterally walk away from a contract with impunity. Defendant has merely denied its contractual relationship with plaintiff. To allow this with no award of even incidental damages is to negate the meaning of the contract itself, which specifically provides for storage charges to be paid by defendant.

Finally, in its second opinion the trial court misconceived the effect of the eight-month negotiating period. Finding that Amtraco did not "request" the plaintiff to maintain the lactose in storage during the period, (A 164) he held that BFG was not justified in keeping the lactose in storage. The question is not whether both parties agreed to the storage. The question under §2-706 is whether BFG was reasonable in waiting the eight months. The trial court failed to address this question at all, except implicitly in its first decision where it awarded storage and other charges to plaintiff through June 30, 1972, and noted that plaintiff should have accepted defendant's offer at that time.

CONCLUSION

The first decretal paragraph of the judgment below should be affirmed.

In view of the above errors of law, and omissions of fact findings, the case must be remanded to the trial court for findings on the quantum of damages both contractual and incidental suffered by plaintiff.

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Attorneys for Plaintiff
Appellant-Appellee

Of counsel:

John R. Horan
Joseph D. Becker

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

TERRY HORNER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 35 FIFTH AVE NEW YORK, N.Y.

That on the 8 day of OCTOBER, 1976, deponent personally served the within REPLY BRIEF OF PLAINTIFF-APPELLANT AND CROSS APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

LIEBMAN, EULAU, ROBINSON & PEARLMAN
ATTORNEYS FOR DEFENDANT-APPELLEE-APPELLANT
32 EAST 57TH ST.
NEW YORK, N.Y.

Terry D. Horner

Sworn to before me this
8th day of October, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977